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No. 82-472

In The

Supreme Court of the United States

October Term, 1982

JOSEPH C. RUSSELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the term "interest" as used in 18 U.S.C. § 1963(a) (1), the criminal forfeiture provision of the Racketeer Influenced and Corrupt Organizations statute (RICO) 18 U.S.C. §§ 1961 - 1968, does not include income or profits derived from a pattern of racketeering activity?

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BRIEF OF PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit en banc is reported at 681 F. 2d 952. The panel opinion is reported at 648 F. 2d 367.

JURISDICTION

The En Banc judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 2, 1982. The Petition for Writ of Certiorari was filed on September 9, 1982. Certiorari was granted January 10, 1983. The jurisdiction of this court is invoked under 28 U. S. C. § 1254.

STATUTES INVOLVED

The following statutes are involved in this case and are reproduced as part of the Appendix to this brief:

1. 18 U. S. C. § 1962
2. 18 U. S. C. § 1963

STATEMENT OF THE CASE

Petitioner was indicted on June 8, 1977, in an 83 page Indictment, along with 21 co-defendants. The Government alleged violations of substantive RICO, 18 U. S. C. § 1962-(c); RICO conspiracy, 18 U. S. C. § 1962(d); and two mail frauds. The RICO conspiracy charge included a prayer of forfeiture of monies received by the petitioner through a course of racketeering.

On February 24, 1978, the jury returned guilty verdicts against petitioner on each of the four charges, as

well as a verdict of forfeiture. Judgments of sentence and forfeiture were entered.

On appeal to the Fifth Circuit Court of Appeals, petitioner's convictions were affirmed, but the order of forfeiture was vacated. On Rehearing En Banc, the Court upheld the forfeiture in its decision of August 2, 1982.

Petition for Writ of Certiorari was filed on September 9, 1982. Certiorari was granted January 10, 1983.

STATEMENT OF FACTS

The issue presented upon this Petition for Writ of Certiorari is a purely legal question, the resolution of which need not be considered in light of the facts presented at trial. As stated in the En Banc opinion of the Fifth Circuit Court of appeals, the facts are as follows:

> Briefly, the evidence showed that a group of individuals associated for the purpose of committing arson with the intent to defraud insurance companies. This association in fact enterprise, composed of an insurance adjuster, homeowners, promoters, investors, and arsonists operated to destroy at least eighteen residential and commercial properties in Tampa and Miami, Florida between July, 1973 and April, 1976. The panel summarized the ring's operations as follows:
>
> > At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner filed an inflated proof of loss statement and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought

> buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds.

As pointed out in the En Banc dissenting opinion, Russello was one of the individuals who owned and insured his building before the advent of the RICO arson ring. He later participated and feloniously burned his property.

Additional facts are set forth in the En Banc opinion of the Fifth Circuit Court of Appeals reproduced in the Appendix.

SUMMARY OF ARGUMENT

18 U. S. C. § 1963 proscribes what is subject to forfeiture upon a RICO conviction. The term "interest" contained in 18 U. S. C. § 1963(a)(1) is limited to interests in the enterprise. Had Congress intended profits and proceeds to be forfeitable, it would have so designated as it had in the accompanying Continuing Criminal Enterprise statute. Furthermore, legislative history and intent demonstrate the policy considerations behind limiting forfeitable interests to interests in the enterprise: the exorcism of racketeering from and the rejuvenation of legitimate business. Although policy determinations may warrant the forfeiture of profits and proceeds, as evidenced by subsequent express state legislation, the extension of the definition of "interest" beyond the express wording of the statute and beyond legislative intent should be made only by Congressional decree.

ARGUMENT

The term "interest" as used in 18 U. S. C. § 1963 (a) (1), the criminal forfeiture provision of the Racketeer Influenced and Corrupt Organizations Statute (RICO) 18 U. S. C. §§ 1961-1968, does not include income or profits derived from a pattern of racketeering activity.

This Court is presented, for the first time, with deciding the meaning of the term, "interest" as used in 18 U. S. C. § 1963(a)(1), the criminal forfeiture provision of the Racketeer Influenced and Corrupt Organizations Statute (RICO) 18 U. S. C. § 1961 - 1968. The lower courts, in deciding this issue, are split between those courts which recognize income and profits to be a forfeitable "interest", *United States v. Martino,* 681 F. 2d 952 (5th Cir. 1982); *United States v. Romano,* 523 F. Supp. 1209 (S. D. Fla. 1981); and those which do not. *United States v. Marubeni America Corporation,* 611 F. 2d 673 (9th Cir. 1980); *United States v. Meyers,* 432 F. Supp. 456 (W. D. Pa. 1977); and *United States v. Thevis,* 474 F. Supp. 134 (N. D. Ga. 1979).

The concept of *in personam* forfeiture is foreign to American jurisprudence. Yet, this concept was revived by the passage of the Racketeer Influenced and Corrupt Organizations Statute (RICO) 18 U. S. C. § 1961 - 1968.

> Unlike *in rem* forfeiture proceedings against contraband or articles put to unlawful use, § 1963 operates against the person of the defendant and includes within the punishment for his crime forfeiture of a portion of his estate. Such a provision, while known to the common law in England and the colonies, is foreign to the federal criminal law. The 91st Con-

> gress recognized that, in passing § 1963, it was partially repealing a statute passed by the First Congress, which in its present form provides that: "No conviction or judgment shall work corruption of blood or forfeitures of estate." 18 U. S. C. 3563.

United States v. Rubin, 559 F. 2d 975 at 991, n. 15 (5th Cir. 1977).

In light of the history of American jurisprudence disfavoring forfeitures, *see, United States v. Grande,* 620 F. 2d 1026 (4th Cir. 1980), it is not surprising that criminal and forfeiture statutes must be strictly construed. *United States v. Rubin, supra*; *Baca v. Commissioner,* 326 F. 2d 189 (5th Cir. 1964); and *United States v. Enmons,* 410 U. S. 396, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973).

18 U. S. C. § 1963(a) provides in part that, "Whoever violates any provision of § 1962 . . . shall forfeit to the United States (1) any interest he has acquired or maintained in violation of § 1962." It is respectfully submitted that the express wording of 18 U. S. C. § 1963(a)(1) does not include income, money, or profits; nor are such concepts made a part thereof by legislative history and intent.

In recognizing that 18 U. S. C. § 1963 does not specify a forfeiture of profits, the Court in *United States v. Meyers, supra,* stated in footnote 18 that the continuing criminal enterprise statute, 21 U. S. C. § 848(a)(2), which was passed within weeks of the RICO statute, specifically mentions the forfeitability of profits. "By contrast, the terms of 21 U. S. C. § 848(a)(2)(A) provide, (with respect to narcotics offenses) for forfeiture of 'the profits obtained . . . in such enterprise.' 21 U. S. C. 848(a)(2)(B) then contains language substantially identical with that involved here." Based upon this failure of the legislature

to specify profits in the RICO statute, when they had done so in the Continuing Criminal Enterprise statute, the Court reasoned that the legislature did not intend to reach profits, but rather intended to reach ownership and investment interests in the enterprise.

The failure of Congress to specify profits in the RICO forfeiture statute has also been recognized by the Third Circuit in *United States v. Long*, 654 F. 2d 911 (3rd Cir. 1981). In comparing 18 U. S. C. § 1963 with 21 U. S. C. § 848, the Court recognized in footnote 6 that:

> While these forfeiture provisions are similar, they are by no means equal in scope; the *in personam* forfeiture of C. C. E. covers all the profits earned from any continuing criminal enterprises. RICO, conversely, requires the defendant to forfeit only his personal interest in the tainted enterprise.

Likewise, this failure to mention income or profits in the RICO forfeiture statute was recognized in *United States v. Marubeni America Corporation, supra:*

> Section 1962(a) makes certain investments of racketeering "income" illegal. When Congress meant "income," . . . it used that term.' 'We note that Congress specifically provided for forfeiture of "profits" obtained from a criminal enterprise in the Comprehensive Drug Abuse Prevention and Control Act of 1970. 21 U. S. C. § 848(a)(2)(A). The Drug Abuse Act was passed by the same Congress in the same month as RICO. Had Congress intended forfeiture of racketeering income, we believe it would have expressly so provided.

The express wording of 18 U. S. C. §§ 1962 and 1963 was further evaluated in *United States v. Thevis, supra,* wherein the Court held:

> That this distinction between income and interest was recognized by Congress is illustrated by 18 U. S. C. § 1962(a). That subsection makes it illegal to invest income derived from a pattern of racketeering activity by acquiring an interest in an enterprise. Though Congress recognized that income and profits could be generated by a pattern of racketeering activity, it chose to require forfeiture only of the interest in, and not the income of, a § 1962 enterprise.

Since the creation of RICO and its forfeiture proceedings, several states have adopted identical or similar legislation. These State legislatures, in an apparent recognition of the failure of Congress to include the forfeiture of money, income, and profits, expressly include such provisions. For example, Arizona Revised Statutes 13-2314 copied 18 U. S. C. § 1963(a)(1) and (2), but added in addition thereto the following forfeiture provisions: "All proceeds traceable to an offense included in the definition of racketeering . . . and all monies, negotiable instruments, securities, and other things of value used or intended to be used to facilitate commission of the offense."

Many states, recognizing the limits of forfeitable "interest", have expanded forfeitures to include "any interest or property he has acquired or maintained in violation of (the racketeering) chapter"; Rhode Island General Laws 7-15-3, Hawaii Revised Statutes, § 842-3; or eliminated the concept of "interest" entirely, relying instead upon any or all property. Criminal Code of Georgia, 26-3405, Indiana Statutes Annotated, 34-4-30.5-3. Several states permit forfeiture of, "all property, real or personal, including money. . . ." Florida Statutes Annotated, 895.05, Colorado Criminal Code, 18-17-106, and Oregon Revised

Statutes, 166.725. And, Connecticut in Public Act No. 82-343 has extended forfeitures to include, "any property he has acquired or maintained in violation of this Act, including profits derived therefrom. . . ."

Thus, the states which have followed the lead of the Federal Government into the area of racketeering prosecutions have recognized the limits of forfeitable "interest", and have chosen instead to specify the forfeiture of all property or money. Had the states believed the word "interest" to include money or profits, the modification of the forfeiture language contained in the state versions would not have been necessary.

However, if "interest" does not, on its face, include the concept of money or profits, what does it encompass? The legal concept of "interest" is defined in Black's Law Dictionary, Fifth Edition, as, "the most general term that can be employed to denote a right, claim, title, or legal share *in something*". (Emphasis added.) "Interest", by definition, includes of necessity an interest in something.

The "something" is provided by Congress in its wording of 18 U. S. C. § 1963(a) (1), "Whoever violates any provisions of § 1962 . . . shall forfeit to the United States (1) any interest he has acquired or maintained in violation of § 1962." As pointed out in *United States v. Thevis, supra,* "Curiously, the term 'interest' is not defined by RICO. But, as employed in 18 U. S. C. § 1963(a), it derives its meaning from the activities barred by § 1962". Thus, a direct relationship exists between that which is subject to forfeiture under 18 U. S. C. § 1963 as a result of racketeering activity and that which constitutes racketeering activity under 18 U. S. C. § 1962.

> 18 U. S. C. § 1963(a) (1) is directed at an interest acquired or maintained *"in violation of Section 1962."* (emphasis added). The statutory concept on which 18 U. S. C. § 1962 rests is the "enterprise" concept; that is to say, it is the acquisition, maintenance, or participation in an enterprise through a pattern of racketeering activity that is proscribed under that section. Since it is the addition of the "enterprise" concept which distinguishes a RICO prosecution under 18 U. S. C. § 1962 from an ordinary prosecution directed at each of the individual predicated acts which constitute the pattern of racketeering activity, this Court is convinced that the "interest" subject to forfeiture under 18 U. S. C. § 1963(a) is limited to the interest in the enterprise, and does not extend to fruits or profits generated from the enterprise.

For example, in *United States v. Rubin, supra,* the Fifth Circuit was called upon to determine the forfeitability of a union office. In holding the union office to be forfeitable, the Court recognized the holding of said office to be an interest in the enterprise. To reach this conclusion, the Court held that the forfeiture provisions of 18 U. S. C. § 1963 related to the forfeiture of interest "in the enterprise".

> Congress clearly contemplated forfeiture of any ownership or investment type of interest a defendant might hold in an organization he had conducted through a pattern of racketeering activity. It is just such an interest that would not otherwise terminate with incarceration and would enable a defendant and/or his confederates to maintain control of an organization. . . . The Senate Judiciary Committee wrote that the language 'is designed to accomplish a *forfeiture of any interest of any type in the enterprise*'. . . . (Congress) also intended forfeiture fully to serve the broader goal of legally separating persons who run an enterprise through the defined racketeering activity from the enterprise itself.

In addition to the absence of money, profits or proceeds in the wording of 18 U. S. C. § 1963(a)(1), and the express § 1962 enterprise limitation, the legislative history of the enactment of the statute and the interpretation in light thereof indicates that profits were not intended by Congress to be forfeitable under the concept of "interest". *United States v. Marubeni America Corporation, supra.*

The RICO statute was enacted as Title IX of the Organized Crime Control Act of 1970. The purpose of the Bill introduced in the Senate is clearly stated:

> It has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.

S. Rep. No. 91-617, 91st Cong. 1st Sess. 76 (1969).

Recognizing that something more than traditional criminal sanctions were needed to accomplish this objective, Congress included the forfeiture sanction. The Senate Bill, S. 30, as reported by the Committee on the Judiciary, contained a forfeiture provision which was enacted verbatim as 18 U. S. C. § 1963. Compare § 1963(a), Senate Report, supra at 23, with 18 U. S. C. § 1963(a). The Senate Report which accompanied S. 30 explained the penalties provided for in these terms:

> A fine of $25,000 or imprisonment for not more than 20 years is provided for a violation. In addition, provision is made for the criminal forfeiture of the convicted person's *interest in the enterprise* engaged in interstate commerce.

Senate Report, supra at 34 (emphasis added).

This forfeiture of the convicted person's interest in the enterprise is consistent with the stated purpose under

the enactment of the statute. It has the effect of divesting the criminal of his interest in the enterprise, such being the dominant theme in the RICO Act. The forfeiture remedy is clearly keyed to this paramount concept and is designed to separate the criminal from his proprietary interest in the enterprise itself.

The House shared the Senate's view of divestiture. The House Report, made subsequent to the Senate Report, summarized the sanctions for RICO violations in the following language:

> A fine of $25,000, or imprisonment of not more than 20 years is provided for a violation. In addition, provision is made for criminal forfeiture of the convicted person's *interest in the enterprise* engaged in interstate commerce.

H. R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970) reprinted in (1970) U. S. Code Cong. & Ad. News 4007, 4010 (emphasis added).

As a principal sponsor of the Bill, Senator McClellan explained the forfeiture provisions to the House sub-committee as follows:

> **The purpose of Title IX is to fill these gaps in our power to deal with criminal infiltration of legitimate organizations. To the criminal penalties of fine and imprisonment is added the criminal sanction of forfeiture. . . . Title IX would provide an effective adjunct to criminal prosecution: it will punish the criminal appropriately by *forfeiting to the government his ill-acquired interests in a legitimate business*, and directly aid the business community by expelling him from the legitimate business he had abused.**

Hearings on S. 30, and Related Proposals Relating to Control of Organized Crime in the United States Before Sub-

committee 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 55, at 107 (1970) (hereinafter cited as House Hearings) (emphasis added).

Senator McClellan supplemented his testimony before the House Sub-Committee by providing a memorandum underscoring the major provisions of the Bill. In that memorandum, Senator McClellan explained the punitive sanctions and interpreted the forfeiture provision as providing for the following:

> A fine of $25,000 or imprisonment for not more than 20 years is provided for a violation. In addition, provision is made for the criminal forfeiture of the convicted person's *interest in the enterprise* engaged in the interstate commerce.

House Hearings, supra, at 85 (emphasis added).

Other Senators declared the forfeiture provision to apply to the defendant's interest in the enterprise. In doing so, they utilized language clearly indicating that it was a proprietary interest in the enterprise itself that was reached by the forfeiture sections. For example, Senator Byrd, the senior member of the Senate Judiciary Committee, remarked:

> **It is becoming increasingly apparent that such convictions alone, which simply remove leaders from control of syndicated owned enterprises but do not attack the *vested property interests* whose control passes on to other Cosa Nostra leaders are not adequate to demolish the structure of the surviving organizations which they run.**

116 Cong. Rec. 607 (emphasis added).

In a similar vein, Senator Yarbrough stated his view of the forfeiture sanction:

> Along with severe penalties, a unique criminal forfeiture provision will make it possible to divest the racketeer of *any interest he may have obtained in the organization or business.*

116 Cong. Rec. 603 (emphasis added).

The position that the forfeiture sanction is limited to one's interest in the enterprise is further buttressed by reference to a letter sent from Deputy Attorney General Richard Kleindienst to Senator McClellan. In the body of the Senate Report, the criminal forfeiture sanction was explained by reference to a quotation from said letter. In that letter Deputy Attorney General Kleindienst expressed the Justice Department view of the forfeiture provision as follows:

> It is felt that this revival of the concept of forfeiture as a criminal penalty, *limited as it is in § 1963(a) to one's interest in the enterprise* which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of congressional wisdom rather than a constitutional power.

Reprinted in Hearings on S. 30. Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess., at 407 (1969) (emphasis added).

The En Banc court in the pending case rejected the importance of this letter because it believed it to have been taken out of context. Specifically, the En Banc court reasoned that the Kleindienst letter was a response to Congress' question as to the constitutionality of enacting an *in personam* forfeiture statute, and that any reference to the scope of the forfeiture statute was surplusage.

Thus, reasoned the En Banc court, the Kleindienst letter could not be used to establish Congressional intent.

Although the Kleindienst letter was initially submitted as a comment on Senate Bill S. 1861, the letter was subsequently adopted by the Committee and incorporated into Senate Report S. 30. As such, the adoption of the Kleindienst letter indicates Congress' understanding and intent in passing the RICO forfeiture provisions contained in S. 30, 18 U. S. C. § 1963.

Furthermore, Congress explicitly announced the stated purpose and scope of the forfeiture statute: "Section 1963 provides criminal penalties for the violation of Section 1962, above. Sub-section (a) provides the remedy of criminal forfeiture. . . . The language *is designed* to accomplish a forfeiture of any "interest" of any type *in the enterprise* acquired by the defendant or in which the defendant has participated in violation of Section 1962." Senate Report No. 91-617. This express purpose is further quoted in House Report No. 91-1549, which states that RICO calls for forfeiture of interests "in an enterprise".

The limitation of forfeitable interests under 18 U. S. C. § 1963(a)(1) to interests in an enterprise is consistent with the purpose and scope of RICO. As stated in "Forfeiture Under 18 U. S. C. § 1963 - RICO'S Most Powerful Weapon", 17 *American Criminal Law Review* 379 at 380, 385:

> Congress expected forfeiture to play a surgical, not a destructive role in the statutory scheme. Its purpose was to restore victimized commerce to health. . . .
>
> Had Congress intended to provide for the forfeiture of profits, proceeds, goods, or property, it

could have expressed that intent as it did with respect to narcotics violations in another statute. That Congress chose to go so far with respect to narcotics is understandable because the sale of narcotics is an inherently illegal endeavor, and all proceeds or fruits of the endeavor are attributable to illegal conduct. Furthermore, total liquidation of the narcotics endeavor is the ultimate intent of the statutory prohibition. However, with RICO, Congress could not rationally seek forfeiture of all proceeds or fruits of a racketeer-influenced, but otherwise inherently legitimate endeavor. Destruction of the enterprise is not the goal. The income and proceeds may be attributable, at least in part, to the efficacy of the legitimate endeavor, not to the racketeering methods.

Under the Government's interpretation of "interest", forfeiture could result in the dismantling of legitimate business, rather than merely the surgery necessary to revitalize it. The following hypothesis serves to demonstrate the point. Two individuals, over a period of many years, have established a profitable, ongoing, legitimate enterprise. During the course of business, one of the two individuals commits acts which would subject him to RICO prosecution, the second partner remaining unaware and innocent of these crimes. Under this hypothesis, the legitimate business made a total annual profit of $300,000: $200,000 of which was received as a result of the racketeering activity, unbeknownst to the innocent partner. Half of these profits were then reinvested in the ordinary course of business, leaving only $150,000 in liquid assets.

After a successful prosecution, the guilty partner, under 18 U. S. C. § 1963(a)(2) would be required to forfeit his interest in the corporation. In addition, pursuant to the Government's interpretation of "interest" under 18 U. S. C. § 1963(a)(1), the corporation would be required

to forfeit the $200,000 received from racketeering activity, even though its assets totalled only $150,000.

Thus, if 18 U. S. C. § 1963(a)(1) required the forfeiture of all profits or proceeds acquired by the enterprise, it is conceivable that said forfeiture could directly affect the stability of the company by causing extreme economic hardship, or even bankruptcy. Such was not the intent of RICO. Rather, the purpose as previously noted was to excise the criminal element from legitimate business, so that legitimate business could survive. By requiring the guilty partner to relinquish his control of the enterprise, 18 U. S. C. § 1963(a)(2), and by requiring the guilty partner to relinquish his interest in the enterprise, 18 U. S. C. § 1963(a)(1), the legitimate business is given an opportunity to survive without racketeering control or interest.

18 U. S. C. § 1963(a) provides that:

> Whoever violates any provision of Section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of Section 1962 and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962.

Clearly, Congress intended 18 U. S. C. § 1963(a)(1) to reach interests independent of those deemed forfeitable under 18 U. S. C. § 1963(a)(2). If "interest" were as all encompassing as suggested by the *en banc* decision below, 18 U. S. C. § 1963(a)(2) would have no meaning indepen-

dent of 18 U. S. C. § 1963(a)(1); all "interest" of any kind would be forfeitable irrespective of whether it offered a source of influence over the enterprise. Such an interpretation, as suggested by the *en banc* court would render 18 U. S. C. § 1963(a)(2) mere surplusage.

What, then, is the distinction between 18 U. S. C. § 1963(a)(1) and 18 U. S. C. § 1963(a)(2)? It is respectfully submitted that the distinction is the difference between mere passive investments and influential control of an enterprise.

18 U. S. C. § 1963(a)(2) clearly relates to interests affording a source of influence over or control of the enterprise. This forfeiture alone, however, does not totally satisfy the purpose of RICO in separating racketeering from legitimate business, since it does not reach *all* investments and ownership in an enterprise. 18 U. S. C. § 1963 (a)(1) fills this void by rendering forfeitable all interests in the enterprise which do not offer such influence or control.

> While 18 U. S. C. §§ 1963(a)(1) and (a)(2) both provide for the forfeiture of an interest in the enterprise, it seems to this Court that § 1963(a)(1) is directed toward the forfeiture of a minority interest in an enterprise controlled by others. 18 U. S. C. § 1963(a)(2), on the other hand, reaches the interest in the enterprise where the defendant is in control, either alone or in conjunction with other defendants.

United States v. Thevis, supra.

Even the *en banc* decision below recognized this distinction in n. 18:

> We note that interests in an enterprise may take varying forms, since they encompasss both ownership

> interests (e. g. stock ownership or real property interests) and interests affording a source of influence over the control of the enterprise.

This concept of 18 U. S. C. § 1963(a)(2) reaching influence and control of the enterprise, while 18 U. S. C. § 1963 (a)(1) reaches passive investments in an enterprise was illustrated in the dissenting opinion below.

> The majority concludes that "reading an enterprise limitation into § 1963(a)(1) renders that section surplusage." I disagree. One example underscores the error in this suggestion. Hypothesize that an individual uses income from racketeering activity to purchase 2% of the stock of a corporation listed on the stock exchange. The investment is totally passive; No element of control or influence envisioned by § 1963(a)(2) is involved. This interest would not be forfeitable under § 1963(a)(2), but it would be forfeitable under § 1963(a)(1) since the acquisition violates § 1962(a). The recognition of an enterprise limitation in § 1963(a)(1) does not, therefore, render that section surplusage.

The scope of RICO reaching passive investments in an enterprise, as well as controlling interests, was recognized by this Court in *United States v. Turkette,* 452 U. S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981):

> RICO also prescribes the investment of income derived from racketeering activity in an enterprise engaged in and which affects interstate commerce as well as the acquisition of an interest in or control or (sic) any such enterprise through a pattern of racketeering activity.

One of the major reasons for the En Banc court's opinion that 18 U. S. C. § 1963(a)(1) reached profits and not interests in the enterprise was the belief that to decide otherwise would relegate violations of 18 U. S. C. § 1962 (c) exempt from forfeiture.

> The cure for these defects in reasoning lies in examination of the effect of § 1963(a)(1) on a § 1962(c) violation. Section 1962(c) makes conducting an enterprise through a pattern of racketeering unlawful. The forfeiture resulting therefrom under § 1963(a)(1) is the interest (or interests) acquired through or as a result of that unlawful conduct. Forfeiture of defendant's interest in the enterprise is governed by the impact of § 1963(a)(1) and (2) upon § 1962 (a) and (b). If § 1962(c) results in any forfeiture at all—and § 1963(a) provides for forfeiture if one violates *any* § 1962 Section—it must provide for forfeiture of something more than § 1962(a) or (b) or be mere surplusage.

It is generally considered that enterprises under 18 U. S. C. § 1962(a) and (b) are legally recognized enterprises or companies. 18 U. S. C. § 1962(c) relates to both employees of enterprises and companies who do not have investment interests and to what is generally recognized to be enterprises in fact. Thus, a group of individuals who violate the dictates of the RICO statute may themselves be the illegal enterprise under 18 U. S. C. § 1962(c). *United States v. Turkette, supra.* It was the En Banc court's dilemma in cases of enterprises in fact under 18 U. S. C. § 1962(c), that there appears little that is subject to forfeiture other than profits.

This dilemma was not unrecognized by both Congress and the Justice Department when they sought enactment of the RICO statute. As stated in the dissenting opinion in the case below, "I am cognizant that this conclusion occasions problems with respect to associations in which one cannot own a legal interest, as in the case *sub judice.* This limitation was recognized by the Justice Department in its comments on the legislation when it observed that

'there is often nothing to forfeit . . . in the case of individuals associated in fact.'"

This does not mean, however, that there are no interests in the enterprise which may be forfeited in cases involving enterprises in fact, since forfeitable interests do exist.

As stated in *United States v. Thevis, supra*:

> In the case at bar, the enterprise is an association, an organization, absent statutory intervention, incapable of holding property in its own right. Nevertheless, the defendants have allegedly furthered the goal of the enterprise by placing property which they held in their individual or corporate capacities under the control of the association so that the association could achieve their jointly held goals.
>
> Like an investment in the stock of a corporation or a capital interest in a partnership, a person's informal contribution of property to an association is an interest in that association subject to forfeiture under 18 U. S. C. § 1963 (a) (2), since the contributed property has been put at the risk of the association's success. It is an investment in the success of the association, just as surely as a purchase of stock in a corporation or a contribution of capital to a partnership. . . .
>
> The statute requires forfeiture of his interest—that is the property which the defendant contributed to the enterprise to forward its goals and the defendant's interest in the undistributed profits of the enterprise.

For example, in *United States v. Godoy, supra,* the Court was called upon to recognize an association in fact under 18 U. S. C. § 1962(c). Certain monies were made by the criminal enterprise through a pattern of racketeer-

ing. Some profits were invested by the enterprise in fact, through the purchase of real estate; other profits were distributed to the defendant, who invested same in a personal residence.

The Government conceded that the profits which had been distributed to the individual defendant and thereafter personally invested in residential property was not forfeitable under RICO since said property was not an interest in the enterprise. The Government did, however, seek forfeiture of the income-producing real estate under 18 U. S. C. § 1963(a)(1) in that said real estate investments were an "interest in any enterprise".

The Court concluded that distributed profits of an illegal enterprise were not forfeitable under the express wording of 18 U. S. C. § 1963(a)(1) and (2). Rather, the Court recognized that, "such proceeds have to be invested in an enterprise before they can be forfeited". The income-producing real estate was purchased on behalf of the criminal enterprise and, as such, was an asset of said enterprise from which the guilty defendants must be separated. Since the enterprise in fact owned investments, as opposed to the individuals, the interests of the enterprise in fact were subject to forfeiture.

Thus, the Ninth Circuit in *United States v. Godoy, supra,* and *United States v. Marubeni America Corporation, supra,* have recognized the relationship between 18 U. S. C. § 1962(c) and 18 U. S. C. § 1963(a)(1). Profits of an illegal enterprise in fact, which have been distributed to the individual members, are not forfeitable, since they are not an interest in the enterprise. However, assets belonging to the enterprise, including investments, are for-

feitable interests. It is only the forfeiture of all assets of an enterprise in fact which will successfully terminate an individual's relationship with the entity and meet the Congressional intent of total divestment.

What, then, is the legal relationship between 18 U. S. C. §§ 1962 and 1963 pertaining to forfeitable "interest"? A guide through the labyrinth would be as follows: 18 U. S. C. § 1962(a) and (b) relate to enterprises in law, while 18 U. S. C. § 1962(c) relates to employees in enterprises in law and to enterprises in fact. 18 U. S. C. § 1963(a)(2) provides for the forfeiture of active investments and interests obtained by enterprises in law in which either a controlling interest or over one per cent investment has been obtained. 18 U. S. C. § 1963(a)(1) provides for the forfeiture of passive investments and interests obtained by enterprises in law in which neither a controlling interest nor over one per cent investment has been obtained. In addition, 18 U. S. C. § 1963(a)(1) provides for the forfeiture of interests in the enterprise obtained by enterprises in fact, such as real estate and other investments. 18 U. S. C. § 1963(a)(1), being limited to interests in the enterprise and to individual members' interest in said enterprise, does not extend to profits or dividends which have been distributed and over which the enterprise has no control.

The following hypothesis serves to exemplify what may or may not be forfeitable under each type of RICO prosecution. The first example relates to violations of 18 U. S. C. § 1962(a), (b), and (c), and forfeitable interests under 18 U. S. C. § 1963(a)(1) and (2):

Legitimate Drug Manufacturers, Inc. was in the lawful business of manufacturing Methaqualone. An inde-

pendent conspiracy was formed between a Vice President, an employee, and a stockholder of the company. The object of this conspiracy was to sell the legitimately manufactured Methaqualone of Legitimate Drug Manufacturers, Inc. to the "black market". To hide their illegal activities, the three conspirators funnelled part of their profit through the books of Legitimate Drug Manufacturers, Inc. These channelled profits amounted to substantial income to Legitimate Drug Manufacturers, Inc.

The three co-conspirators were indicted and convicted of violating 18 U. S. C. § 1962. In particular, the Vice President was convicted of having an "interest or control of any enterprise" in violation of 18 U. S. C. § 1962(b). The employee was convicted of being "employed by or associated with any enterprise", in violation of 18 U. S. C. § 1962(c). The stockholder was convicted of investing "any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise" in violation of 18 U. S. C. § 1962(a).

In ordering the divestment of each co-conspirator's interest in the enterprise, the Court would be required to utilize both 18 U. S. C. §§ 1963(a)(1) and (2). The Vice President would forfeit his job with Legitimate Drug Manufacturers, Inc. under 18 U S. C. § 1963(a)(2), since his position afforded him "a source of influence over" the enterprise. The employee would forfeit his job under 18 U. S. C. § 1963(a)(1), since his position amounted to an interest in the enterprise. The stockholder would forfeit his stock and ownership rights in Legitimate Drug Manufacturers, Inc., under 18 U. S. C. § 1963(a)(2) if his interest were in an amount "affording a source of influence"

and under 18 U. S. C. § 1963(a)(1) if his interest were in an amount not affording such an influence.

The forfeiture of proceeds would not be required, since such would not serve the purpose of RICO. The termination of the three co-conspirator's relationship with Legitimate Drug Manufacturers, Inc. would sufficiently surgically remove the racketeer influence from an otherwise legitimate business.

The second fact scenario involves violations of 18 U. S. C. § 1962(b) and (c) and forfeitable interests under 18 U. S. C. § 1963(a)(1). Three individuals form a conspiracy to illegally manufacture Methaqualone. Rather than calling these individuals by name, their enterprise shall be loosely referred to as Illegitimate Drug Manufacturers. As members of an enterprise or association in fact, Illegitimate Drug Manufacturers purchases land, buildings, equipment, chemicals, and trucks, all utilized in the building of a secret Methaqualone factory. Some of the profits of this illegal association are placed in a joint bank account used for the benefit of the enterprise. Other profits are invested in income-producing property on behalf of the enterprise. The remaining profits are distributed to the individual members of the association, who then invest personally in such items as residential houses.

The three co-conspirators were then indicted and convicted of violating 18 U. S. C. § 1962(b) and (c), relating to enterprises or associations in fact.

In ordering the divestment of each co-conspirator's interest in the enterprise, the Court would utilize 18 U. S. C. § 1963(a)(1). All land, equipment and property which

had been purchased on behalf of the enterprise and in furtherance of the enterprise, although actually purchased by the individuals, would be forfeitable as an interest in the enterprise. Likewise, the assets of the enterprise would be forfeitable. This would include the joint bank account, undistributed pro[illegible] and investment income-producing property, which would otherwise inure to the benefit of the enterprise.

As previously noted, a defendant may be separated from enterprises at law by forfeiting his ownership and interests therein; the legitimate business is entitled to survive independent of the defendant's racketeering. Such is not the case in enterprises in fact. Since there is no legitimacy to the association, the enterprise in its entirety must be eliminated to serve Congressional intent. To do so, any interest of the enterprise, since none is legitimate, is forfeitable.

On the other hand, since distributed profits are not forfeitable, those monies which were given to the individuals and thereafter invested by the individuals no longer belong to the enterprise. Since the enterprise no longer has control over these assets, they are not interests in the enterprise.

The third example also relates to violations of 18 U. S. C. § 1962(b) and (c), and forfeitable interests under 18 U. S. C. § 1963(a)(1). Under this hypothesis, three co-conspirators agree to violate RICO through the sale of Methaqualone. No property or equipment is purchased by the enterprise to further its interests. Some of the profits and proceeds are invested in income-producing property on behalf of all members of the enterprise. Other

profits and income are distributed to the individual members.

The three co-conspirators were indicted and convicted of violating 18 U. S. C. § 1962(b) and (c) in that they engaged in racketeering through an enterprise in fact. Forfeiture would be required under 18 U. S. C. § 1963(a)(1) of the investments which were made by and/or on behalf of the enterprise. Such forfeiture would totally eliminate the existence of the enterprise, as intended by Congress. The distributed proceeds, which no longer were an asset of the enterprise, would not be forfeitable.

This analysis of 18 U. S. C. §§ 1962 and 1963 is mandated by the express statutory wording and by the accompanying legislative history and intent. In fact, it is only this analysis which gives full meaning to each statutory subsection, thus rendering no portion of the RICO statute mere surplusage.

The Government's argument for the forfeiture of proceeds stems from their belief that an enterprise limitation on forfeitable "interest" would result in no forfeiture in the case at bar. The defendant herein was charged with violating RICO through a series of arsons. Specifically, the Government alleged that the defendant and others maintained or purchased property which was burned after being over-appraised and insured. The insurance proceeds were distributed directly to the individual members of the conspiracy as personal assets. It is these proceeds for which the Government seeks forfeiture, since, according to the prosecution and the Court below, there is nothing else to forfeit.

Yet, there were interests in the enterprise which were forfeitable. As previously noted, any property or assets

which are brought to the enterprise by an individual for the purpose of furthering the enterprise become assets of the enterprise. *United States v. Thevis, supra; United States v. Godoy, supra;* and *United States v. Marubeni America Corporation, Inc., supra.* In an arson-ring conspiracy, the assets which were purchased or contributed by the individual members in furtherance of the enterprise were the buildings to be burned. Although the Government sought this forfeiture against defendant Russello, a Motion for Judgment of Acquittal was granted by the trial court. (R. Vol. 70, pages 172-3). This Court should not be misled into requiring the forfeiture of distributed proceeds, when such is neither required by the express wording of the statute nor by Congressional intent, simply because that which is forfeitable herein (the land and buildings) was not so ordered by the trial court.

That is not to say, that the criminal should be entitled to benefit from his "ill-gotten gains". Nor does the RICO statute mandate such a conclusion. Rather, its provisions serve the purpose intended, to revitalize legitimate business.

To this end, Congress has imposed strict civil sanctions against racketeers in favor of legitimate business. 18 U. S. C. § 1964(c) provides that, "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

Thus, in order to further the purposes of RICO in removing racketeer influence from legitimate businesses

and in aiding the rejuvenation and survival of such legitimate businesses, Congress authorized injured parties to recover the "ill-gotten gains" of the racketeer rather than requiring the forfeiture of said proceeds to the Government. And to further punish the racketeer, said recovery is permitted threefold.

Lastly, it must be noted that there is nothing prohibiting Congress from authorizing criminal forfeiture of distributed proceeds. In fact, Congress may ultimately wish to seek the forfeiture of profits and proceeds, as have many of the state legislatures. However, such a policy determination should be made at first instance by the legislature. As noted in the dissent below:

> The Court today concludes that the word "interest", as here used, includes income or profits derived from a pattern of racketeering activity. I do not share that conclusion, adhering to the view expressed in the panel opinion that the term "interest", as used in § 1963(a)(1) applies only to an interest in the enterprises envisioned in §§ 1962(a)(b) and (c) and not to income derived from illegal activity. Whether this distinction is wise, prudent, or appropriate is, as I perceive it, a matter best left to the legislative branch, for it represents a significant policy decision.

Congress, since the passage of 18 U. S. C. §§ 1961 etc. has apparently recognized the possibility of profits and proceeds being a desirable interest to be forfeited in RICO prosecutions. *See, Weiner, Crime Must Not Pay:* RICO Criminal Forfeiture in Perspective, 1 N. Ill. L. R. 226, 243 (1981) (article written by Edward C. Weiner, Deputy Director, Office of Economic Crime Enforcement, United States Department of Justice).

For example, H. R. 4110 was introduced in the First Session of the 97th Congress. H. R. 4110 would have

amended 18 U. S. C. § 1963 to include the additional forfeiture of profits and proceeds upon being convicted of racketeering:

> (b) *In addition* to any other penalties prescribed by this section, whoever violates any provision of section 1962 shall forfeit to the United States (1) any profits and proceeds, regardless of the form in which held, that are acquired, derived, used, or maintained in violation of section 1962, and (2) any profits and proceeds, regardless of the form in which held, that are acquired, indirectly or directly, as a result of a violation of section 1962.
>
> (c) Assets forfeitable under this section include those interests, proceeds, or profits owned by an individual convicted of violating section 1962 and acquired by him, indirectly or directly, through the use of an illegitimate enterprise or illicit association, or through a combination of individuals.
>
> (d) To the extent that assets, interests, profits, and proceeds forfeitable under this section—
>
> (1) cannot be located;
>
> (2) have been transferred, sold to, or deposited with third parties; or
>
> (3) have been placed beyond the jurisdiction of the United States,
>
> the court, upon conviction of the individual charged, may direct forfeiture of such other assets of the defendant as may be available, limited in value to those assets that would otherwise be forfeited under subsections (a) and (b) of this section. Upon petition of the defendant, the court may authorize redemption of assets forfeited under this subsection provided the assets described in subsections (a) and (b) are surrendered or otherwise remitted by such defendant to the jurisdiction of the court.

A similar Bill was introduced before the Senate in the Second Session of the 97th Congress, S. 2320. The purpose of this legislation was, "to amend section 1963 of Title 18, United States Code, . . . to provide for the criminal forfeiture of the proceeds of racketeering activity. . . ." In part, S. 2320 would have amended 18 U. S. C. § 1963 to read as follows:

> (a) Whoever violates any provision of section 1962 of this chapter—
>
> (1) shall be fined not more than $25,000 or imprisoned for not more than twenty years, or both; and
>
> (2) shall forfeit to the United States any property, irrespective of any provision of State law—
>
> (A) constituting, or derived from, any interest in or contribution to an enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 of this chapter;
>
> (B) constituting a means by which he has exerted influence or control over any enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the acquisition, maintenance, establishment, operation, conduct or control of, in violation of 1962 of this chapter; and
>
> (C) constituting, or derived from, any proceeds which he obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962 of this chapter.
>
> The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pur-

suant to this section, that he forfeit to the United States all property described in paragraph (2).

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities including, but not limited to—

(A) any position, office, appointment, tenure, commission, or employment contract of any kind which the incumbent acquired or maintained in violation of section 1962 of this chapter, through which the incumbent conducted, or participated in or facilitated the conduct of, the affairs of an enterprise in violation of Section 1962 of this chapter, or which afforded the incumbent a source of influence or control over the affairs of an enterprise which was exercised in violation of section 1962 of this chapter;

(B) any compensation, right or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in subparagraph (A) which the incumbent obtained, directly or indirectly, through a pattern of racketeering activity or unlawful debt collection in violation of section 1962 of this chapter, or which accrued to the incumbent during the period that he controlled, influenced, conducted, or participated in or facilitated the conduct of, the affairs of the enterprise in violation of section 1962 of this chapter; and

(C) any amount payable or paid under any contract for goods or services which was awarded or performed through a pattern of racketeering activity or unlawful debt collection.

(c) All right, title, and interest in property described in subsection (a)(2) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is held in the name of, or possessed by, a person other than the defendant may be the subject of special verdict of forfeiture and thereafter shall be ordered forfeited to the United States: *Provided*, that the Attorney General shall not direct disposition of any such property if the person establishes to the Attorney General by evidence contained in a petition pursuant to subsection (h) that—

(1) he was a bona fide purchaser of the property for value; and

(2) he was reasonably without cause to believe that the property was of the type described in subsection (a)(2).

(d) If any of the property described in subsection (a) (2)—

(1) cannot be located,

(2) has been transferred to, sold to, or deposited with, a third party,

(3) has been placed beyond the jurisdiction of the court,

(4) has been substantially diminished in value by any act or omission of the defendant, or

(5) has been commingled with other property which cannot be divided without difficulty,

> the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5). . . .

It is important to note that H. R. 4110 and S. 2320 re-evaluated the entire concept of criminal forfeiture in racketeering cases. In addition to attempting to expand RICO forfeitures to profits and proceeds, specific provisions were included for the protection of third parties and legitimate business. Congress recognized that a wholesale extension of RICO forfeiture to profits and proceeds would injure innocent parties unless specific protections were afforded.

Another example of Congress' awareness that profits and proceeds were not subject to forfeiture under the RICO statutes as originally enacted is H. R. 2646. In H. R. 2646, the House sought, "to provide that certain profits or proceeds of persons convicted of racketeering offenses involving violations of drug law are subject to forfeiture".

> (3) in cases in which the racketeering activity consisted of any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, any proceeds or profits derived from any interest, security, claim or property or contractual right, described in clause (1) or (2) of this subsection.

This attempt to seek forfeiture of profits and proceeds in only drug-based RICO prosecutions is a clear recognition that the statute, as presently written, is not so all-encompassing. Clearly, Congress' intent in seeking passage of H. R. 2646 was to extend the scope of RICO

forfeiture to drug cases, not to eliminate the forfeiture of profits and proceeds in all but drug cases.

Moreover, this attempted treatment of drug cases indicates Congress' conscious awareness of the distinction between drug and other forms of racketeering. The distinction between the goal in drug-related cases being the elimination of illegal profits and the goal in other forms of racketeering cases being the elimination of investment, control and influence in legitimate business, is the same conceptual difference recognized by Congress in 1969 in originally specifying profit and proceeds forfeitures upon conviction of a Continuing Criminal Enterprise and not RICO.

Thus, this current legislation indicates Congress' inability to conclusively decide whether it wishes to seek forfeiture of all proceeds, some proceeds, or any proceeds upon conviction of racketeering. This significant policy decision should be left to the legislative branch for final determination.

In conclusion, the petitioner would respectfully submit that 18 U. S. C. § 1963(a)(1) is limited to interests in the enterprise. Such an interpretation is supported by the express wording of the statute. An all-encompassing definition of "interest", as suggested by the Government, would render 18 U. S. C. § 1963(a)(2) mere surplusage. Moreover, the legislative intent and history of the RICO statute, the companion Continuing Criminal Enterprise statute, and subsequent proposed legislations indicate the policy distinctions between drug forfeitures and RICO forfeitures. Specifically, the goal of forfeitures under C. C. E. is to confiscate the illegal profit. The goal

of forfeitures under RICO, on the other hand, is the rejuvenation of legitimate business through the exorcism of racketeering. The scope of RICO forfeiture should be extended only by Congressional decree.

CONCLUSION

For the above cited cases, authorities, reasons and theories, it is respectfully requested that this Honorable Court reverse the judgment and order of forfeiture entered below.

Respectfully submitted,

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APPENDIX

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall b nlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941.)

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter [18 USCS § 1962] shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962 [18 USCS § 1962], and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 [18 USCS § 1962].

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs, laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereon, such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter [18 USCS §§ 1961 et seq.] by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 943.)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions

on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 943.)

§ 848. Continuing criminal enterprise

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this title or title III the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this title or title III—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of title 18 of the United States Code and the Act of July 15, 1932 (D. C. Code, secs. 24-203-24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a)) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

(Oct. 27, 1970, P. L. 91-513, Title II, Part D, § 408, 84 Stat. 1265.)

97TH CONGRESS
1ST SESSION

H. R. 4110

To improve the effectiveness of criminal forfeiture, and for other purposes

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IN THE HOUSE OF REPRESENTATIVES

JULY 9, 1981

Mr. ZEFERETTI introduced the following bill; which was referred jointly to the Committees on the Judiciary and Energy and Commerce

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A BILL

To improve the effectiveness of criminal forfeiture, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Forfeiture Amendments Act of 1981".

SEC. 2. Section 1963 of title 18, United States Code, is amended—

(1) by redesignating subsections (b) and (c) as subsections (e) and (f); and

(2) by inserting after subsection (a), the following new subsections:

"(b) In addition to any other penalties prescribed by this section, whoever violates any provision of section 1962 shall forfeit to the United States (1) any profits and

proceeds, regardless of the form in which held, that are acquired, derived, used, or maintained in violation of section 1962, and (2) any profits and proceeds, regardless of the form in which held, that are acquired, indirectly or directly, as a result of a violation of section 1962.

"(c) Assets forfeitable under this section include those interests, proceeds, or profits owned by an individual convicted of violating section 1962 and acquired by him, indirectly or directly, through the use of an illegitimate enterprise or illicit association, or through a combination of individuals.

"(d) To the extent that assets, interests, profits, and proceeds forfeitable under this section—

"(1) cannot be located;

"(2) have been transferred, sold to, or deposited with third parties; or

"(3) have been placed beyond the jurisdiction of the United States,

the court, upon conviction of the individual charged, may direct forfeiture of such other assets of the defendant as may be available, limited in value to those assets that would otherwise be forfeited under subsections (a) and (b) of this section. Upon petition of the defendant, the court may authorize redemption of assets forfeited under this subsection, provided the assets described in subsections (a) and (b) are surrendered or otherwise remitted by such defendant to the jurisdiction of the court."

SEC. 3. (a) Section 408 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Public Law 91-513, 21 U. S. C. 848) is amended—

(1) in subsection (a)(1) by striking "in paragraph (2)" and inserting in lieu thereof the following: "by this section";

(2) in subsection (a)(2)(A) by adding after the phrase "the profits obtained by him in such enterprise" the following: ", including any profits and proceeds, regardless of the form in which held, that are acquired, derived, used, or maintained, indirectly or directly, in connection with or as a result of a violation of paragraph (1)"; and

(3) by adding the following new subsection after subsection (d):

"(e) To the extent that assets, interests, profits, and proceeds forfeitable under this section—

"(1) cannot be located;

"(2) have been transferred, sold to, or deposited with third parties; or

"(3) have been placed beyond the territorial jurisdiction of the United States.

the court, upon conviction of the individual charged, may direct forfeiture of such other assets of the defendant as may be available, limited in value to those assets that would otherwise be forfeited under subsection (a) of this section. Upon petition of the defendant, the court may authorize redemption of assets forfeited under this subsection, provided the assets described in subsection (a) are surrendered or otherwise remitted by such defendant to the jurisdiction of the court.".

Calendar No. 749

97TH CONGRESS
2D SESSION

S. 2320 (Partial Excerpt)

[Report No. 97-520]

To amend section 1963 of title 18, United States Code, and the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U. S.C. 801 et seq.) to provide for the criminal forfeiture of the proceeds of racketeering activity, to provide for the sanction of criminal forfeiture for all felony drug offenses, to facilitate forfeitures in drug related and racketeering cases, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 31 (legislative day, FEBRUARY 22), 1982

Mr. THURMOND (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

AUGUST 10 (legislative day, JULY 12), 1982

Reported by Mr. THURMOND, without amendment

A BILL

To amend section 1963 of title 18, United States Code, and the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U. S. C. 801 et seq.) to provide for the criminal forfeiture of the proceeds of racketeering activity, to provide for the sanction of criminal forfeiture for all felony drug offenses, to facilitate forfeitures in drug related racketeering cases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Comprehensive Criminal Forfeiture Act of 1982".

PART A

SEC. 101. Section 1963 of title 18, United States Code, is amended to read as follows:

"§ 1963, Criminal penalties.

"(a) Whoever violates any provision of section 1962 of this chapter—

"(1) shall be fined not more than $25,000 or imprisoned for not more than twenty years, or both; and

"(2) shall forfeit to the United States any property, irrespective of any provision of State law—

"(A) constituting, or derived from, any interest in or contribution to an enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 of this chapter;

"(B) constituting a means by which he has exerted influence or control over any enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the acquisition, maintenance, establishment, operation, conduct or control of, in violation of section 1962 of this chapter; and

"(C) constituting, or derived from, any proceeds which he obtained, directly or indirectly,

from racketeering activity or unlawful debt collection in violation of section 1962 of this chapter.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this section, that he forfeit to the United States all property described in paragraph (2).

"(b) Property subject to criminal forfeiture under this section includes—

"(1) real property, including things growing on, affixed to, and found in land; and

"(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities including, but not limited to—

"(A) any position, office, appointment, tenure, commission, or employment contract of any kind which the incumbent acquired or maintained in violation of section 1962 of this chapter, through which the incumbent conducted, or participated in or facilitated the conduct of, the affairs of an enterprise in violation of section 1962 of this chapter, or which afforded the incumbent a source of influence or control over the affairs of an enterprise which was exercised in violation of section 1962 of this chapter;

"(B) any compensation, right or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in subparagraph (A) which the incumbent obtained, directly or indirectly, through a pattern of racketeering activity or unlawful debt collection in

violation of section 1962 of this chapter or which accrued to the incumbent during the period that he controlled, influenced, conducted, or participated in or facilitated the conduct of, the affairs of the enterprise in violation of section 1962 of this chapter; and

"(C) any amount payable or paid under any contract for goods or services which was awarded or performed through a pattern of racketeering activity or unlawful debt collection.

"(c) All right, title, and interest in property described in subsection (a)(2) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is held in the name of, or possessed by, a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States: *Provided,* That the Attorney General shall not direct disposition of any such property if the person establishes to the Attorney General by evidence contained in a petition pursuant to subsection (h) that—

"(1) he was a bona fide purchaser of the property for value; and

"(2) he was reasonably without cause to believe that the property was of the type described in subsection (a)(2).

"(d) If any of the property described in subsection (a)(2)—

"(1) cannot be located,

"(2) has been transferred to, sold to, or deposited with, a third party,

"(3) has been placed beyond the jurisdiction of the court,

"(4) has been substantially diminished in value by any act or omission of the defendant, or

"(5) has been commingled with other property which cannot be divided without difficulty,

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5). . . .

97TH CONGRESS
1ST SESSION

H. R. 2646

To amend section 1963 of title 18 of the United States Code to create a rebuttable presumption about the forfeiture of property of persons convicted of racketeering offenses involving violation of drug laws, to provide that the property forfeited in connection with such racketeering offenses, and the proceeds from such property, be used for local, State, and Federal drug law enforcement, and to provide that certain profits or proceeds of persons convicted of racketeering offenses involving violations of drug law are subject to forfeiture.

IN THE HOUSE OF REPRESENTATIVES

MARCH 19, 1981

Mr. SAWYER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend section 1963 of title 18 of the United States Code to create a rebuttable presumption about the forfeiture of property of persons convicted of racketeering offenses involving violation of drug laws to provide that the property forfeited in connection with such racketeering offenses and the proceeds from such property be used by local State, and Federal drug law enforcement, and to provide that certain profits or proceeds of persons convicted of racketeering offenses involving violations of drug law are subject to forfeiture.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1963 of title 18 of the United States Code is amended—

(1) in subsection (a)—

(A) by striking out "and" immediately before "(2)"; and

(B) by striking out the period at the end and inserting in lieu thereof the following: ", and (3) in cases in which the racketeering activity consisted of any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, any proceeds or profits derived from any interest, security,

claim, or property or contractual right, described in clause (1) or (2) of this subsection.";

(2) in subsection (c), by striking out the period at the end and inserting in lieu thereof the following: ", except that the Attorney General, may in his discretion, provide for the use of any such property forfeited in cases in which the racketeering activity consisted of any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, for Federal drug law enforcement or the improvement of State and local drug law enforcement. There is hereby appropriated, to remain available until expended, for each fiscal year beginning after the date of the enactment of this sentence a sum equal to the proceeds from the disposition during the immediately preceding fiscal year of all such property forfeited in cases in which the racketeering activity consisted of any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, to be used in the discretion of the Attorney General for Federal drug law enforcement and the improvement of State and local drug law enforcement."; and

(3) by adding at the end the following new subsection:

"(d) If the racketeering activity consists of any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, it shall be presumed that all assets or other property of the convicted person are subject to forfeiture under this section, unless such convicted person proves otherwise by the preponderance of the evidence.".